

WESTERN SLOPE CARBON, INC.

IBLA 85-261

Decided June 29, 1987

Appeal from a decision of the District Manager, Montrose District Office, Bureau of Land Management, requiring payment of advance royalties in lieu of continued operation on coal lease C-27103.

Affirmed.

1. Coal Leases and Permits: Royalties -- Mineral Leasing Act: Royalties

Sec. 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(b) (1982), requires continued operation of a lease that has achieved diligent development. However, the requirement may be suspended upon application and payment of advance royalties. The failure to make advance royalty payments in lieu of continued operation subjects the lease to cancellation.

2. Regulations: Force and Effect as Law -- Regulations: Validity

The Board of Land Appeals has no authority to declare invalid duly promulgated regulations of this Department. Such regulations have the force and effect of law and are binding on the Department.

APPEARANCES: Dennis C. Stickley, Esq., Salt Lake City, Utah, for Western Slope Carbon, Inc.; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Western Slope Carbon, Inc. (WSCC), has appealed from a decision of the District Manager, Montrose (Colorado) District Office, Bureau of Land Management (BLM), dated December 7, 1984, requiring payment of advance royalties in lieu of continued operation on coal lease C-27103 for "continued operation years 2 through 5," i.e., from April 1981 to the date of the decision.

Coal lease C-27103 was issued with an effective date of October 1, 1979, pursuant and subject to the terms and provisions of the Mineral Leasing Act (MLA), of February 25, 1920, as amended, 30 U.S.C. §§ 201 through 209 (1982).

The December 7, 1984, BLM decision notified appellant that it was not in compliance with section 3 of its coal lease. Section 3 of lease C-27103 states in part: "[a]fter diligent development is achieved, the lessee shall maintain continued operation of the mine or mines on the lease lands." "Diligent development," the decision explained, "means the production of recoverable coal reserves in commercial quantities (1 percent of the recoverable coal reserves) prior to the end of the diligent development period." 43 CFR 3480.0-5(a)(6), (a)(12). "Continued operation" means "the production of not less than commercial quantities of recoverable coal reserves in each of the first 2 continued operation years following the achievement of diligent development and an average amount of not less than commercial quantities . . . computed on a 3-year basis consisting of the continued operation year in question and the 2 preceding continued operation years." 43 CFR 3480.0-5(a)(8). The decision stated:

According to your General Mining Order No. 1 report submitted in 1980 and verified by the District Mining Office, USGS (now the Branch of Solid Minerals, BLM), coal lease C-27103 originally contained 1,485,000 tons of recoverable E-seam reserves. Therefore, the production of 14,850 tons by October 1, 1989 (ten years after lease issuance) was required to meet the diligent development requirements. [See 43 CFR 3480.0-5(a)(13).] Our records show that 24014.76 tons of raw coal was produced by the end of March 1980, meeting the diligent development requirement and establishing a continued operation year of April 1 through March 31. [See 43 CFR 3480.0-5(a)(9).] Since April 1980, the following production has occurred on lease C-27103:

Continued Operation Year	Production, tons raw coal
1 - April 1980 to March 1981	58163.74
2 - April 1981 to March 1982	0
3 - April 1982 to March 1983	0
4 - April 1983 to March 1984	0
5 - April 1984 to present	0

In accordance with Section 7 of the lease and 43 CFR 3483.3 and 3483.4, Western Slope Carbon was required to apply for a suspension of continued operation and, upon approval, begin advance royalty payments by April 30, 1981.

Section 7 of the lease provides:

ADVANCE ROYALTY -- Upon request by the lessee the mining supervisor may accept, for a total of not more than 10 years, the payment of advance royalties in lieu of the condition of continued operation for any particular year. Any payment of advance royalties in lieu of continued operation shall be pursuant to an agreement signed by the lessee and lessor, which shall be made a

part of this lease. The agreement shall include a schedule of payments and shall be subject to the advance royalty conditions set forth in the regulations. The advance royalty shall be based on a percent, as specified in the lease, of the value of a minimum number of tons which shall be determined on a schedule sufficient to exhaust the leased reserves in 40 years from the date of approval of the mining plan.

43 CFR 3483.4(a) provides that advance royalty may only be accepted in lieu of continued operation upon application to and approval by the authorized officer. 43 CFR 3483.3(a)(2) provides that the authorized officer may suspend the requirement for continued operation upon the payment of advance royalty.

On appeal to the Board WSCI states that it operated lease C-27103 in conjunction with other coal leases, that the entire production was sold under contract, that the contract expired in 1982 and due to the distressed coal market it was unable to renew its agreement or to enter into a contract with another purchaser, and that the mine was closed in March 1982. "An application for suspension of continued operations per 43 CFR 3483.3 was not submitted." (Statement of Reasons (SOR) at 2-3).

WSCI contends that coal production from lease C-27103 has never been sufficient to achieve diligent development and as a result thereof advance royalties are not due under section 7 of the lease and 43 CFR 3483.3. Appellant further contends:

[T]he regulations adopted by the Secretary of Interior which establish that production of 1 percent of the recoverable coal reserves within the ten (10) year diligent development period constitutes production of commercial quantities are contrary to the intent [of the] Mineral Leasing Act. Under the Mineral Leasing Act a coal lessee has a period of ten years in which to produce coal in commercial quantities. 30 USC § 207(a).

A determination of whether production of commercial quantities has been achieved, must take into consideration whether the mining operation is profitable. Failure to establish a profitable mining operation within the lease's diligent development period is a clear demonstration that commercial quantities have not been produced. Without the production of commercial quantities advance royalties are not due and the diligent development period continues to run.

As discussed above in the Statement of Facts, Western Slope Carbon had attempted to produce coal from the E-seam using the more costly longwall continuous mining approach. The costs associated with this type of mining operation in conjunction with the loss of its main coal contract and overall depressed conditions of the coal market made the operation of the Lease C-27103

unprofitable. The unprofitability of operating the lease was encountered prior to the end of the lease's diligent development period.

SOR at 5. WSCI does not dispute the recoverable reserve or production figures recited in the decision.

In its answer BLM contends that WSCI objects to the regulation defining diligent development in terms of a percentage of recoverable coal reserves and that the Board is not authorized to hold invalid duly promulgated regulations of the Department.

[1] 30 U.S.C. § 207(b) (1982) subjects each lease "to the conditions of diligent development and continued operation of the mine or mines, except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee." In adopting the definition of diligent development and the related definition of commercial quantities, the Department explained:

Although [the Mineral Leasing Act] does not specify a rate of production to be the definition of diligent development, it does require that coal be produced in commercial quantities from new and readjusted leases. In order to implement this provision and, at the same time, accommodate regional diversity, MMS believes that production of 1 percent of the recoverable coal reserves by the end of 10 years and 1 percent every year thereafter on a 3-year average does not impose an onerous burden on an operator/lessee

By defining "diligent development" in terms of "commercial quantities", DOI thus allows operators/lessees the maximum flexibility to tailor the timing of the operations while still complying with the statutory mandate [for termination of leases not producing in commercial quantities at the end of ten years, see 30 U.S.C. 207(a)].

47 FR 33157 (July 30, 1982). In this case the lessee achieved diligent development within the first year. Once that occurred, it was obligated to maintain continued operation unless this obligation was suspended under 43 CFR 3483.3. 43 CFR 3483.1(a)(2). If it did not do so, it is obligated to pay advance royalties instead, or the lease is subject to cancellation. 43 CFR 3483.2(c).

[2] We cannot accept appellant's argument that the regulations adopted by the Secretary which establish that production of 1 percent of recoverable coal reserves within the diligent development period constitutes production of commercial quantities is contrary to the intent of the Mineral Leasing Act. Such regulations have the force and effect of law and are binding on the Board. Robert R. Perry, 87 IBLA 380 (1985); Ahtna, Inc., 87 IBLA 283 (1985); Wisenak, Inc., 87 IBLA 67 (1985).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge.

